Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

ROBERT W. BLANCHETTE
Vice President-Law and General Counsel
ASSOCIATION OF AMERICAN RAILROADS
American Railroads Bldg.
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

JOHN H. BROADLEY
DAVID W. OGDEN *
KIT PIERSON
JULIE M. CARPENTER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Counsel for Amicus

* Counsel of Record

March 12, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Association of American Railroads ("AAR") is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads and appears in an

amicus capacity before courts, agencies, and the Congress in matters of common interest.

AAR's members operate a national transportation network, with tracks covering approximately one hundred twenty thousand miles in virtually every state in the continental United States.[1] Within each state, each railroad corporation's tracks may touch many different counties or judicial districts. By virtue of this geographically broad inter- and intra-state presence, and because each railroad is a foreign corporation in every state in which it operates (except the state of its incorporation or domicile), the impact on AAR members is particularly harsh when state venue statutes discriminate against out-of-state corporate defendants. One of the major effects of such discrimination is, as demonstrated vividly in this case and in other areas of the United States, a blatant and vigorous strain of forum-shopping. This manipulation of the court system imposes significant additional costs at a time when the litigation explosion is threatening the financial vitality of the railroads, an industry that is facing an increasingly competitive transportation market.[2]

AAR files this brief to emphasize the significance of this issue to the railroad industry. It strongly supports Petitioner's position that the Montana venue statute, which provides that non-resident corporations may be sued in any of the state's fifty-six counties while resident corporations may be sued only in their county of residence, violates the Equal Protection Clause of the Fourteenth Amendment.

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[1] Association of American Railroads, *Railroad Facts* 44 (1991).

[2] In 1990, nearly 8000 lawsuits were filed against railroads under the Federal Employers Liability Act ("FELA"), 45 U.S.C. 51, *et seq.*, the statute under which this case arose. Railroads spent over one billion dollars on FELA payouts and transaction costs in 1990. Association of American Railroads, 1990 Report of Claim and Litigation Experience (1991).

INTRODUCTION AND SUMMARY OF ARGUMENT

In the State of Montana, a non-resident railroad corporation with tracks somewhere in Montana can be sued in any county in Montana by any person, resident or non-resident, even when the event causing the injury did not occur in Montana. In Montana, this gives plaintiffs a choice of fifty-six counties. However, a resident railroad corporation can be sued only in one county[3]—the county of its residence—for exactly the same type of conduct and injury. MCA § 25-2-118.[4]

This discrimination between resident and non-resident corporations, on its face, violates the Fourteenth Amendment's guarantee of equal protection of the laws. Neither the State nor the Montana court has asserted any rational basis to justify the discrimination, and there is no such rational basis. The only basis articulated by the Montana Supreme Court has been that the broad federal venue provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, justifies allowing railroad workers greater flexibility in venue decisions than other litigants. However, this rationale fails to justify the Montana statute since that statute does not distinguish railroad corporations from non-railroad corporations, but rather resident corporations from non-resident corporations. Indeed, under the Montana statute, the plaintiff who sues a *resident* railroad is restricted to

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[3] In tort actions, Montana allows a plaintiff a choice of two counties in which to sue a resident defendant: the county where the injury occurred, or the county of residence of the defendant. MCA § 25-2-122. However, in *Haug v. Burlington Northern Railroad Co.*, 770 P.2d 517, 520 (Mont. 1989), the Montana Supreme Court held that "if none of the defendants reside in Montana, a plaintiff may choose any county in the state as the place of trial of a tort action, notwithstanding the alternate choice of venue under § 25-2-122."

[4] The Montana courts have conclusively held that a Montana corporation "resides" in only one place—the county in which it has its principal place of business. *Platt v. Sears, Roebuck & Co.*, 721 P.2d 336, 338 (Mont. 1986).

only one county (or at most, two) rather than being able to choose among the fifty-six counties available to the plaintiff suing a *non-resident* railroad.

The effect of a statute such as Montana's, which deprives non-residents of the protections of the law afforded to residents, is to encourage rampant forum-shopping against non-resident defendants. The two underlying actions in this case were brought against Burlington Northern ("BN") under FELA in state district court in Yellowstone County, Montana. BN, whose tracks pass through twenty-five Montana counties, has its principal place of business in Montana in Hill County and a registered agent in Lewis and Clark County. In each of the underlying cases, the plaintiffs alleged that the injury occurred in Sheridan, Wyoming, not in Montana. Each plaintiff was a resident of Sheridan, Wyoming, not Montana. The defendant, BN, was a non-resident corporation that happened to do business in Montana, as well as in Sheridan, Wyoming. As a result, plaintiffs were able to choose from among fifty-six forums in Montana the forum that would be most favorable to them. Indeed, the only apparent basis for bringing these suits in Yellowstone County was plaintiffs' belief that a Yellowstone County jury would be more sympathetic to plaintiffs or more hostile to defendants than would be other juries. Had BN been a Montana corporation, it could have insisted on venue in Hill County. Because it is a non-resident corporation, it was forced to defend in a county that serves as a magnet for FELA claimants. This disparity, and the resulting forum-shopping against non-resident corporations, are at issue before the Court.

ARGUMENT

Whether states may, consistent with the Equal Protection Clause of the Fourteenth Amendment, deny nonresidents the protection of venue statutes that they offer residents has already been decided by this Court. In *Power Manufacturing Company v. Saunders*, 274 U.S. 490 (1927), this Court considered the question of whether an Arkansas venue statute—virtually identical to the statute at issue in Montana—conflicted with the Equal Protection Clause. That statute required personal injury actions against domestic corporations to be brought in a county where the corporation had a place of business or where its chief officer resided, but allowed the identical actions against foreign corporations to be brought in any county in the state. *Id.* at 491-92. The Court noted,

> It of course rests with the State to prescribe the venue of actions brought in her courts. But the exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action. Procedural statutes are not excepted, but must fall like others when in conflict with those limitations.

Id. at 495. Holding that the statute plainly discriminated in a substantial way against foreign corporations in favor of domestic corporations, and that there was no substantial difference in the situations of foreign and domestic corporations, nor any rational basis to justify the discrimination, the Court struck the venue provision as unconstitutional.[5] Significantly, the defendants in that case did not assert that they had a fundamental right to

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[5] *Saunders* has not been overruled, and, although later decisions of this Court have questioned its continued vitality, those cases are all distinguishable. For example, in *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 645 (1976), although Justice Brennan noted there was some question regarding *Saunders*, the Court found it unnecessary to consider *Saunders* because it found that the statute before it did not in fact deny comparable discovery to a foreign defendant that it afforded to a domestic defendant.

venue in a particular place, but instead argued only that *if* the state accorded the protections of a venue statute to residents, it could not deny the protections of that statute to non-residents without some legitimate basis for the denial.

This case is identical. The Montana statute discriminates, on its face, against out-of-state defendants. While such discrimination might be countenanced under the Equal Protection Clause if it were based on a rational distinction, no such rational basis has been or could be articulated. Indeed, the Montana Supreme Court specifically declined to address the issue of "whether there is a rational basis for treating all out-of-state corporations differently from all domestic corporations." *Ford v. Burlington Northern Railroad Co.*, No. 90-577, 90-558 (Mont. Sup. Ct. Aug. 12, 1991), *reproduced in* Petition for Writ of Certiorari, *Burlington Northern Railroad Co. v. Ford*, No. 91-779, Appendix at 9a (hereafter "Petition for Certiorari"). Instead, the court focused solely on railroad corporations and held that "it does appear that there is a commonly accepted historic justification for allowing railroad workers greater flexibility when choosing a forum than other litigants." *Id.* Thus, the court relied on the broad federal venue provisions codified in the FELA statute to justify the statutory discrimination between domestic and foreign corporations in the State of Montana.[6]

The Montana court's rationale does not withstand even the most cursory analysis. Because the FELA provision applies only to railroads, it provides no basis for distinguishing between resident and non-resident corporations. It is plain that under the Montana statute, any Montana railroad corporation may be sued only in the county

[6] The FELA venue provisions allow a plaintiff to sue a railroad in *federal* court in the district of residence of the defendant, or where the cause of action arose, or where the defendant is doing business at the time the action is commenced. 45 U.S.C. § 56.

in which it "resides" (or where the tort occurred), while a non-resident railroad may be sued in any of fifty-six counties that the plaintiff chooses. Thus, the statute treats non-resident railroads differently from resident railroads and (except for residence) treats railroad corporations, as a group, just as it treats non-railroad corporations. FELA creates a distinction between railroads and non-railroads; the Montana venue statute's distinction is between residents and non-residents.

This blatant discrimination against non-residents presents a paradigmatic case for equal protection analysis. Determining an appropriate place for trial presents questions of competing interests between putative plaintiffs and putative defendants in the state. Plaintiffs' interests in convenience, accessibility, and expense must be balanced against defendants' interests in the same factors. These questions are resolved, in significant part, through the political processes involved in the passage of any statute. Thus, as between in-state entities, all of which are represented in the legislature, Montana has made clear that it believes providing venue in a single county fairly and appropriately balances those competing interests.

Essentially the same interests of convenience, accessibility, and expense are at issue when a plaintiff sues a non-resident defendant. In assigning venue to out-of-state defendants, who are not part of the Montana political process, however, Montana has reached a fundamentally different—and vastly more prejudicial—conclusion. That conclusion was that the competing interests of plaintiffs and out-of-state defendants were fairly and appropriately balanced by providing venue in any of *fifty-six* counties, rather than one county, regardless of whether defendant, plaintiff, or the action has any relation to the plaintiff's county of choice. This striking disparity has not been and cannot be justified by any legitimate state interest. Instead, it is clearly the political result of balancing the interests of plaintiffs and their counsel, who are part of

the political process, against the interests of non-resident defendants, who are not represented in the political process.[7]

The effect of the facially discriminatory Montana venue statute is to permit plaintiffs who are suing out-of-state corporations to engage in unlimited forum-shopping. Such plaintiffs can choose among fifty-six possible forums to locate the one most likely to be hostile to the defendant or sympathetic to the plaintiff. In contrast, resident corporations are protected from such manipulation of the court system.

This Court and the state courts have demonstrated an historical aversion to the practice of forum-shopping as a violation of equal protection. As this Court held in the landmark case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), in striking down the doctrine of *Swift v. Tyson*, 10 L.Ed. 865 (1842):

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. . . . *Thus, the doctrine rendered impossible equal protection of the law.*

Erie, 304 U.S. at 75 (emphasis added). Plainly, the policy of *Erie* is that for the same transaction, the accident of a suit by a non-resident litigant in federal court instead of state court a block away should not lead to substantially different results.

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[7] Additionally, while the concept of *in personam* jurisdiction may also keep a defendant from being "haled" into a jurisdiction with which he has no connection, *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), that protetcion is much diminished when a large corporation operates on a nationwide basis, such that it is "present" for jurisdictional purposes over a large geographical area. Moreover, in Montana, as in most states, once a defendant is "found" within the state, he is subject to jurisdiction anywhere in the state; the personal jurisdiction requirement offers no protection from *intra*-state forum shopping. MCA § 25-20-4B.

Although *Erie* was concerned with forum-shopping between state and federal courts, the same reasons that led the Court to reject the practice in that context have justified concerns about forum-shopping among states, or within a state.[8] "When the plaintiff foregoes the economies afforded by bringing suit at home . . . we may begin to be suspicious about whether the plaintiff has sued elsewhere primarily in order to obtain the application of a particular law and thus whether the plaintiff has attempted to 'buy' a particular result." Morrison, "Death of Conflicts," 29 Vill. L. Rev. 313, 362 (1983-84). Whether a plaintiff seeks the application of a different law, or to force the defendant to litigate in an inconvenient forum known or suspected to be hostile to the defendant, the effect is the same: the plaintiff has attempted to manipulate the system to obtain a particular result. It is this manipulation that has been the focus of the courts' aversion to the practice of forum-shopping.[9]

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[8] *See, e.g., Travelers' Indemnity Co. v. Lake*, 594 A.2d 38 (Del. 1991) (recognizing the dangers of forum-shopping); *President's Co. v. Whistle*, 812 P.2d 1194 (Colo. App. 1991) (upholding trial court's denial of declaratory relief because plaintiffs appeared to be forum-shopping); *United Brotherhood of Carpenters Local Union No. 1846 v. Caldwell*, 552 So. 2d 462 (La. App. 1989) (venue provisions intended to prohibit forum-shopping because legislature never intended "to permit a plaintiff to litigate in any parish of the state so capriciously"); *Besser v. E.R. Squibb & Sons, Inc.*, 539 N.Y.S.2d 734 (1989) (construing borrowing statute to avoid the "evils" of forum-shopping), *aff'd* 552 N.Y.S.2d 923 (1990); *Walters v. Inexco Oil Co.*, 440 So. 2d 268 (Miss. 1983) (noting forum-shopping had been perceived evil for more than fifty years).

[9] Historically, one of the purposes of venue provisions has been to provide some protection for defendants from being forced to litigate in inconvenient places that are completely unconnected with either the parties or the event leading to the lawsuit. At English common law, "venue" originally meant the place from which jurors were summoned to Westminster, where all trials in England took place. Because jurors were chosen for their personal knowledge of the facts of the case, they came from the county in which the land at issue lay, or where the event at issue occurred. Even after

Although it is not incumbent on states to provide this venue protection to defendants, they may not constitutionally provide the protection to residents and deny it to non-residents without some reasonable basis for the distinction. *Saunders*, 274 U.S. 490. As noted above, Montana has not provided, and cannot provide such a basis. Predictably, particularly in the FELA context, this lack of protection has led to dramatic numbers of plaintiffs filing in what are perceived to be "hot spots" of sympathetic juries who will award large sums of damages.[10]

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judges were dispatched to counties or circuits to hold court there, and even after proof by witnesses superseded proof by jurors, English plaintiffs enjoyed essentially free venue and could bring most personal actions in virtually any county or circuit. Blume, "Place of Trial in Civil Cases," 48 U. Chi. L. Rev. 1 (1949). However,

> One of the reasons for the separation of the colonies from England had been threats to drag the colonists from their homes to stand trial at distant places. To the people of 1789, place of trial was a matter of great importance, and without safeguards for defendants a federal system of trial courts would not be acceptable.

Id. at 36-73. Echoing this concern nearly a century and a half later, another commentator noted that "since the plaintiff controls the institution of the suit he might behave oppressively toward the defendant unless restrained." Sunderland, "The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act," 1 U. Chi. L. Rev. 188, 192 (1933).

[10] While railroads are covered by the tort-based FELA, virtually all other employers are covered by no-fault workers' compensation laws. Generally, under workers' compensation, a claim can only be brought in a forum that has a significant connection to the claim: for example, where the injury occurred or where the employment relationship was located. A. Larson, *Workmen's Compensation Law*, §§ 86.10, 86.34. In contrast, FELA claimants have much broader latitude in their choice of where to lay a claim. *See* note 6 *supra*. For that reason, among defendants, railroads are particularly vulnerable to forum-shopping. While it is not within the province of this Court to address directly the federal forum-shopping that results from FELA's broad venue provisions applicable in the federal courts, when forum-shopping is exacerbated by a clearly unconstitutional state venue provision, this Court must act.

AAR does not track FELA cases by counties within the different states and therefore has no hard data regarding cases filed in Montana by non-resident plaintiffs who allege no injury in Montana. Nevertheless, it is clear that plaintiffs bringing cases in Montana have the broadest possible choice of forums. Evidence offered by Petitioner Burlington Northern illustrates the extent of forum-shopping within Montana. *See* Petition for Certiorari at 14-17. And, as demonstrated below, empirical evidence from other states suggests that when FELA plaintiffs have this kind of broad venue choice, they commonly engage in forum-shopping on a massive scale.

There can be no question that many FELA plaintiffs and their lawyers believe that certain jurisdictions are "hot spots" of jury sympathy. The number of cases pursued by plaintiffs in these jurisdictions vastly exceeds the number of cases that are connected in any way to these jurisdictions.

One example of such a "hot spot" is Brooke County, West Virginia. The relevant venue statute there, which is quite similar to the Montana statute, provides that when the defendant is a corporation whose principal place of business is not in West Virginia, and whose chief officer does not reside in West Virginia, venue is appropriate where the corporation "does business." W. Va. Code § 56-1-1(a)(2).[11] Venue for a resident defendant corporation, however, is appropriate only where its principal office is located or where its chief officer resides. *Id.* In 1988, 103 plaintiffs had filed FELA actions against Norfolk and Western Railway Company ("N&W") in the Circuit Court of Brooke County, West Virginia. N&W's only connection to Brooke County is that its tracks happen to pass through the county. Of the 103 FELA cases

[11] Significantly, this venue statute, which has itself led to substantial forum-shopping, is even *narrower* than Montana's because Montana does not require an action to be brought where the defendant does business.

filed against N&W in Brooke County, nearly 60 percent (60 cases) were brought by non-residents of West Virginia. Of the 43 plaintiffs that were residents of West Virginia, none were residents of Brooke County. Similarly, none of the injuries claimed in the 103 cases were alleged to have occurred in Brooke County. *Gardner v. Norfolk & Western Ry. Co.*, 372 S.E.2d 786 (W. Va.), *cert. denied*, 489 U.S. 1016 (1988). As was the case with the BN in Montana, had the N&W been an in-state corporation, these cases could not have been brought in the presumably pro-plaintiff Brooke County.

Between 1988 and 1990, after the *Gardner* court held that the doctrine of *forum non conveniens* would not be applied in West Virginia to FELA actions, an additional 818 FELA cases were filed in the Circuit Court of Brooke County. Of those 818 cases, 75 percent (or 644 cases) were filed by non-residents of West Virginia. *Norfolk & Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990).[12] As the West Virginia experience demonstrates, states that have venue statutes like Montana's all hold the potential for forum-shopping aimed at non-resident defendants.

Another "hot spot" for FELA litigation is the city of St. Louis, Missouri. The relevant Missouri venue provision allows plaintiffs to sue railroads in the county where the cause of action occurred, in any county in which a defendant owns, operates or controls a railroad, or in any county in which defendant keeps an office or agent. Mo. Rev. Stat. 508.040. Although, unlike Montana, Missouri does not discriminate between resident and non-resident railroads, and thus raises no equal protection problems, its broad venue statute applicable to all railroads and its history of heavy concentration of FELA cases in one

[12] In 1990, noting the tremendous increase in cases filed, the Supreme Court of West Virginia reversed its position and held that the doctrine of *forum non conveniens* was available in West Virginia in FELA actions. *Tsapis*, 400 S.E.2d 239.

county makes it a good example of the degree to which FELA plaintiffs will shop for the most attractive forum if given the opportunity.

Data compiled by several of the member railroads of AAR demonstrate the degree to which St. Louis has become a magnet for FELA plaintiffs from a broad spectrum of states, regardless of the connection of the plaintiff or the case to St. Louis. For example, of the 528 FELA cases filed against the Union Pacific Railroad in all Missouri state courts between 1986 and 1991, 90 percent (474 cases) were filed in the St. Louis Circuit.[13] Of those 474, 252 (54 percent) were filed by plaintiffs who were not residents of Missouri and who alleged injuries occurring outside the state of Missouri.[14] These plaintiffs who alleged no injury occurring anywhere in Missouri and who came to sue Union Pacific in St. Louis resided in states as far-removed as New York, Colorado, Utah, Texas, Nebraska, and Louisiana, as well as in states closer to Missouri such as Iowa, Arkansas, Kansas, Illinois, Oklahoma and Tennessee.[15] Union Pacific's principal place of business is located outside the state of Missouri.

In the same circuit, Norfolk and Western Railroad Co. has also experienced a crush of FELA litigation. Of the 105 FELA cases pending against Norfolk & Western on Sept. 15, 1991 in St. Louis Circuit, 45 were filed by nonresidents alleging out-of-state injuries.[16] Only 6 of the

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[13] *FELA Cases Filed Against Union Pacific Railroad Company In Missouri State Courts 1986-1991.* The data cited by *amicus* in the following several pages relating to cases filed in St. Louis, Missouri is voluminous, and is not reproduced with this brief. All the data referred to are available from files at AAR offices in Washington, D.C.

[14] *Id.*

[15] *Id.*

[16] *Summary of Data on FELA Cases Pending in St. Louis Circuit Court on October 1 (or Sept. 15, 1991).*

105 were brought by St. Louis residents, and only 11 plaintiffs alleged injury in St. Louis.[17] Similarly, of the 40 cases pending in the St. Louis Circuit against St. Louis Southwestern-Southern Pacific Railroad, 77 percent (31 cases) were brought by non-residents alleging injuries occurring out of the state.[18] No cases brought in that circuit against St. Louis Southwestern-Southern Pacific were brought by residents of St. Louis, and no cases alleged any injury occurring in St. Louis.[19] Both railroads' principal places of business are located outside Missouri.

Finally, Burlington Northern has also undergone an onslaught of FELA litigation in St. Louis brought by non-resident plaintiffs alleging no injury in St. Louis. Thus, out of 212 FELA cases pending against it in the St. Louis Circuit Court on September 15, 1991, 102 cases were actions by non-Missouri residents alleging injuries occurring outside of Missouri.[20] Only 4 of the 212 cases were brought by St. Louis residents, and only 12 of the 212 involved injuries alleged to have occurred in St. Louis.[21] As with the other railroads, BN's principal place of business is located outside Missouri.

These statistics illustrate only isolated examples of the tremendous problem of forum-shopping in FELA actions filed in state courts. And, the problem is not new. A survey done by AAR in 1981 showed that 60 percent of FELA suits filed in 1981 were filed in only five states. AAR

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[17] *Id.*

[18] *FELA Cases Pending In the Circuit Court of the City of St. Louis as of 10/1/91 Against the St. Louis Southwestern Railway Company and/or the Southern Pacific Transportation Company.*

[19] *Id.*

[20] *F.E.L.A. Lawsuits Pending In St. Louis City Court Against Burlington Northern Railroad As of Sept. 15, 1991.*

[21] *Id.*

1981 FELA Closed Claim Survey, Mar. 1982.[22] While more recent nationwide figures are not available, the examples of St. Louis, Missouri and Brooke County, West Virginia, indicate that the problem is not diminishing. The numbers demonstrate that forum-shopping by plaintiffs is pervasive; the reason for the concentration of FELA actions in particular areas is painfully obvious. In *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274, 1282 (1990), this Court took judicial notice of the fact that plaintiffs would be drawn to file in a state with advantageous conditions: "The advantage to Mississippi's personal injury lawyers that resulted from the State's then applicable 6-year statute of limitations has not escaped us: Mississippi's long limitation period no doubt drew plaintiff to the State." However, this Court has also noted that the perception that a jury in one state will give a larger damage award than a jury in another state is *not* a legitimate justification for seeking venue in a forum with no connection to the litigation. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 510 (1947) (granting a *forum non conveniens* motion).

In Montana, the venue provision which denies equal protection to non-resident corporations leads directly to the sort of forum-shopping decried by this Court and the state courts. As noted above, while a state is under no obligation, as a constitutional matter, to provide protection for any defendants through venue statutes, it is not free to provide that protection to residents but deny it to non-residents without some rational basis for doing so. *Saunders*, 274 U.S. 490. Although some states with statutes facially similar to Montana's have taken steps short of changing their statute to mitigate the dangers of forum-shopping produced by such a statute, Montana has not provided even that protection. Thus, numerous state supreme courts have construed their state laws to allow out-of-state corporations to acquire a "residence" for

[22] This Survey is also on file at AAR offices in Washington, D.C.

venue purposes by maintaining a place of business in the state, or by designating an agent for service of process.[23] Instead, Montana has specifically and consistently declined to so construe its own statute. *Haug v. Burlington Northern R. Co.*, 770 P.2d at 519.

Additionally, while a minimum amount of protection might be afforded by application of the doctrine of *forum non conveniens*, the Montana courts have also consistently refused to apply that doctrine in FELA cases.[24] *Haug v. Burlington Northern R. Co.*, 770 P.2d at 519; *LaBella v. Burlington Northern, Inc.*, 595 P.2d 1184 (Mont. 1979).

Since Montana has refused to construe its venue statute in a way that avoids the equal protection violation apparent from the face of the statute, and since nonresident defendants cannot obtain the benefit of the *forum non conveniens* doctrine, defendants are bereft of any protection from the forum-shopping that pervades the FELA filings in the state of Montana.

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[23] *See, e.g., Zolper v. AT&T Info. Sys., Inc.*, 709 S.W.2d 74 (Ark. 1986); *Banning v. Minidoka Irri. Dist.*, 406 P.2d 802 (Idaho 1965); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942).

[24] While the *forum non conveniens* doctrine provides some protection for foreign defendants who are denied the protection of the venue statute, the availability of the doctrine does not remove the equal protection problem. The doctrine is applied only on a case by case basis with virtually sole discretion vested in the trial court. *See Gulf Oil*, 330 U.S. at 508. Without some objective assurance that their proper motions will be granted, foreign defendants are still faced with the prospect of litigating in inconvenient, hostile, or far-off forums while resident defendants are not. Additionally, foreign defendants face the added expense of litigating over the *forum non conveniens* motion.

CONCLUSION

Montana has failed to establish any rational basis for its blatant and substantial discrimination between resident and non-resident corporations. Accordingly, this Court should reverse the ruling of the Montana Supreme Court, and hold that the Montana venue statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Bldg.
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

JOHN H. BROADLEY
DAVID W. OGDEN *
KIT PIERSON
JULIE M. CARPENTER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Counsel for Amicus

March 12, 1992

* Counsel of Record